

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOSHUA COPENHAVER,

Plaintiff,

Case No. 05-CV-73286

HON. BERNARD A. FRIEDMAN

vs.

MICHIGAN DEPARTMENT OF
CORRECTIONS, et al.,

Defendants.

**OPINION AND ORDER ACCEPTING THE MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION, GRANTING IN PART AND DENYING IN PART
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND DENYING
DEFENDANTS' MOTION TO DISMISS**

I. Introduction

This matter is presently before the Court on Magistrate Judge R. Steven Whalen's July 26, 2007 Report and Recommendation ("R & R"). Magistrate Judge Whalen recommended that the Court grant Defendants' Motion for Summary Judgment as to the claims filed against Defendants Ruben and Johns, but deny Defendants' motion as to Defendant Phillips. Magistrate Judge Whalen further recommended that the motion to dismiss Defendant Miller be denied. Defendants filed a timely objection to the R & R. The Court has reviewed this matter de novo as required under FED. R. CIV. P. 72(b). Having reviewed the report and recommendation, the Court hereby accepts and adopts the report and recommendations of Magistrate Judge Whalen, as though they were the findings and conclusions of this Court.

Pro se Plaintiff Joshua Copenhaver is a Jewish inmate in the custody of the Michigan Department of Corrections and is confined to the Florence Crane Correctional Facility in Coldwater, Michigan. The detailed facts and procedural history of this case have been recounted by the Magistrate Judge and need not be repeated here.

II. Defendants' Objections

Defendants base their objections on the Magistrate Judge's conclusion that the "law of the case" doctrine precludes revisiting the issue of whether Plaintiff exhausted his administrative remedies against Defendant Phillips. Defendants argue that the Magistrate Judge's conclusion was incorrect, as there is an exception to the law of the case doctrine. In support of their argument, Defendants attach a recent Sixth Circuit decision, *Peoples Bank & Trust Co. V. Burns (In re Shelton)*. 2007 U.S. App. LEXIS 18497 *9-10 (6th Cir.). This case holds that the "law of the case doctrine is directed at the court's common sense and is not an inexorable command." Id. Accordingly, Defendants argue, this Court is not precluded from revisiting the issue of whether Plaintiff exhausted his administrative remedies.

Defendants arguments are misplaced. While the Magistrate Judge did conclude that the law of the case doctrine controlled, he still went on to examine, once again, the issue of exhaustion. As before, the Magistrate Judge concluded, properly, that Defendants had not met their burden of demonstrating exhaustion, or lack thereof. Furthermore, the Magistrate Judge once again demonstrated the significant questions of fact contained within Plaintiff's substantive claim, which precludes this Court from granting Defendants' motion for summary judgment as to Defendant Phillips.

Accordingly,

IT IS ORDERED that the Magistrate Judge's Report and Recommendation is
ACCEPTED and ADOPTED.

IT IS FURTHER ORDERED that Defendants' motion for summary judgment is
GRANTED as to Defendants Ruben and Johns.

IT IS FURTHER ORDERED that Defendants' motion for summary judgment is DENIED
as to Defendant Phillips.

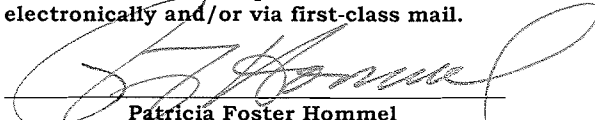
IT IS FURTHER ORDERED that Defendant Miller's motion to dismiss is DENIED.

Date: AUG 20 2007



HON. BERNARD A. FRIEDMAN
CHIEF UNITED STATES DISTRICT JUDGE

**I hereby certify that a copy of the foregoing document
was served this date upon counsel of record
electronically and/or via first-class mail.**



Patricia Foster Hommel
Secretary to Chief Judge Friedman